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NOV 26 2004

Montana Water Court

November 22, 2004

Chief Water Judge C. Bruce Loble
The Montana Water Court
P.O. Box 1389
Bozeman, MT 59771-1389

Via U.S. Mail and email

RE: Draft October 12, 2004 Water Right Adjudication Rules

The Honorable C. Bruce Loble:

I appreciate the opportunity to comment on the Draft Water Right Adjudication Rules, proposed on October 12, 2004. I commend the Water Court, and its Advisory Committee for the time they have spent in reviewing the present Water Court adjudication rules, and proposing improvements thereto.

I have represented Avista Corporation during the adjudication of existing rights on the Bitterroot River. Avista has consistently taken the position that the principal goal of the adjudication must be the issuance of decrees that will set forth accurately historical uses of water to the greatest extent possible. Others will undoubtedly be making recommendations to improve the rules that should be seriously considered. However, I have four areas of concern with the proposed rules that arise from my experience in the Bitterroot adjudication.

1. Admissible Evidence.

Proposed Rule 1.II(15) seems to narrow the scope of information in the custody of DNRC that will be admissible. The Water Court's procedural right and obligation to receive potentially relevant data and information should not be restricted unnecessarily. In many cases, information gathered by the DNRC during the claims examination process is the only historical information available to both claimants and objectors regarding the historical development and use of water.

Moreover, DNRC information often includes the Water Resources Survey data published by the State Engineer's office in the late 1950's. Such information, while not perfect, is an invaluable aid, and may be the only source of information for resolving objections and reconciling conflicting and overlapping claims.

Proposed Rule 1.II(15) may be interpreted to be more restrictive than current rules and practices, and therefore make it more difficult for claimants or objectors to have the Water Court consider historic information in the possession of DNRC. While this change could increase the burden on every claimant and objector, the burden could be especially acute for parties who do not have legal counsel and are less familiar with the process for authenticating documentary evidence. I recommend that the existing concept, which is to be found in the present Rule 1.II(2) be retained.

2. Evidentiary Burden.

The proposed rules may change the present practice and policy of the Water Court respecting the evidentiary burden. Proposed Rule 1.II(22) states in part:

This *prime facie* proof may be contradicted and overcome by other evidence, including post June 30, 1973 evidence, that proves the elements of the claim do not accurately reflect the historical, beneficial use of the water right as it existed prior to July 1, 1973.

This particular language could be clarified by making it clear that the *prima facie* nature of a properly filed claim may be overcome by other evidence, including, *but not necessarily limited to*, post June 30, 1973 information, *and other information in the possession of DNRC*. The Water Court rules should memorialize the principle that has been recognized by the Water Court in the past that information compiled by DNRC during the claims examination process may overcome the *prima facie* status of a claim.

3. On Motion Policy.

The "On Motion" policy of the Water Court is unclear in the proposed rules. One can appreciate that the Water Court may not believe it desirable to call in on its own motion all problematic claims. However, in some instances, the Water Court may be the last barrier to legal validation of claims that are patently in error

or in conflict with other claims. In those instances, the Water Court should assume the obligation of calling in problematic claims. This principle should be reflected in the proposed rules.

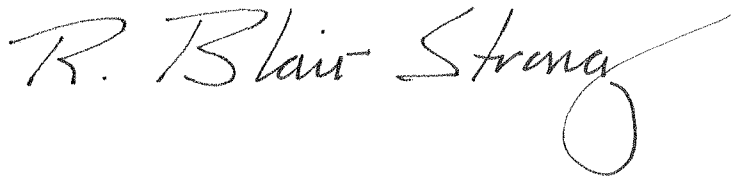
4. Content of Objections.

Proposed Rule 1.II(5) requires that the content of written objections contain, "any changes the objector believes should be made to the claim." However, this requirement burdens objectors with the responsibility of determining how complex claim issues should be resolved, before there has been an opportunity for discovery. Remedies for apparently problematic claims often do not become evident until after information becomes available as a result of informal or formal discovery. Therefore, the present rule, which only requires a statement of the basis of the objection, should be retained.

Thank you for the opportunity to submit comments.

Very truly yours,

PAINE, HAMBLIN, COFFIN,
BROOKE & MILLER LLP

A handwritten signature in cursive script that reads "R. Blair Strong". The signature is written in dark ink and includes a large, stylized loop at the end of the last name.

R. Blair Strong